Supreme Court, U.S.
FILED
APR 26 2002
OFFICE OF THE CLERK

(2)

No. 01-1534

In The

Supreme Court of the United States

TIMOTHY P. KORNWOLF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For *Writ* Of *Certiorari* To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

WILLIAM PERRY PENDLEY*
**Counsel of Record*
TARA BURTON RISMANI
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICUS CURIAE*.... 1

REASON FOR GRANTING *CERTIORARI*..... 3

ARGUMENT

GOVERNMENT MAY NOT DESTROY AN "ESSENTIAL STICK" IN THE BUNDLE OF PROPERTY RIGHTS THAT MAKES UP PROPERTY WITHOUT PAYING JUST COMPENSATION 3

A. *Hodel v. Irving* And *Babbitt v. Youpee* Established That The *Andrus v. Allard* Analysis Used By The Eighth Circuit Has Been Abandoned By This Court To The Point That It No Longer Represents Controlling Precedent Regarding The Fifth Amendment 3

B. In *Lucas v. South Carolina Coastal Council,* This Court Implicitly Abandoned Its Decision In *Andrus v. Allard* When It Found That A Compensable Taking Of Property Had Occurred Despite The Presence Of Other "Strands" Or Essential Sticks In The Bundle Of Rights..... 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Andrus v. Allard, 444 U.S. 51 (1979) ..... *passim*

Babbitt v. Youpee, 519 U.S. 234 (1997) ..... *passim*

Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988), *cert. denied sub nom. Christy v. Lujan*, 490 U.S. 114 (1989) 2

Dolan v. City of Tigard, 512 U.S. 374 (1994) 2

Glosemeyer v. United States, 45 Fed. Cl. 771 (2000) 2

Hodel v. Irving, 481 U.S. 704 (1987) ..... *passim*

Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) 8

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 4

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 8

Laguna Gatuna v. United States, 50 Fed. Cl. 336 (2001) 2

Loretto v. Teleprompter Manhattan CATV Corp., 485 U.S. 419 (1982) 6

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ..... *passim*

Madison v. Graham, 126 F. Supp. 2d 1320 (D. Mont. 2001) 2

Miller Brothers v. Department of Natural Resources, 513 N.W. 2d 217 (Mich. App. 1994) 2

Mountain States Legal Foundation v. Hodel, 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987) 2

TABLE OF AUTHORITIES – Continued

Page

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 8

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 5

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 5

Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) 2

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1982) 7

United States v. General Motors Corp., 323 U.S. 373 (1945) 7

United States v. Kornwolf, 276 F.3d 1014 (8th Cir. 2002) 3, 5

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioner, Timothy P. Kornwolf. Pursuant to Supreme Court Rule 37.3(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF is dedicated to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system.

Since its inception in 1977, MSLF has been a leader in litigation to preserve the rights guaranteed by the U.S. Constitution. Specifically, MSLF has developed expertise in interpreting and applying the constitutional protections afforded the right to own, use, and convey property, including the Due Process Clause and the Takings Clause of the Fifth Amendment. For example, MSLF was a party

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37.6, MSLF represents that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than MSLF, made a monetary contribution toward the preparation or submission of this brief.

in *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987); is counsel for the plaintiffs in *Glosemeyer v. United States*, 45 Fed. Cl. 771 (2000), *Laguna Gatuna v. United States*, 50 Fed. Cl. 336 (2001), and *Madison v. Graham*, 126 F. Supp. 2d 1320 (D. Mont. 2001); and participated as an *amicus curiae* in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied sub nom. Christy v. Lujan*, 490 U.S. 114 (1989), *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996), and *Miller Brothers v. Department of Natural Resources*, 513 N.W. 2d 217 (Mich. App. 1994). MSLF believes that its expertise on the guarantees of the Constitution regarding private property will assist this Court.

Although this is a criminal case, the legal issues in this case may have a far-reaching effect on all property owners, including members of MSLF. Property and the protections afforded property only have meaning if property rights include the right to own, to use, and to transfer property. In fact, the right to transfer private property is the most "essential stick" in the bundle of rights that makes up property ownership. If the decision of the Eighth Circuit is allowed to stand and government is allowed to make unlawful the sale of property, the constitutional guarantees afforded to private property will have been eviscerated.

REASON FOR GRANTING *CERTIORARI*

This Court should grant *certiorari* to conclusively establish that the ruling in *Andrus v. Allard*, 444 U.S. 51 (1979), which allows government to destroy an "essential stick" in the bundle of rights that makes up private property without paying just compensation, is no longer controlling precedent in light of this Court's rulings in *Hodel v. Irving*, 481 U.S. 704 (1987), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Babbitt v. Youpee*, 519 U.S. 234 (1997). *Amicus* contends that this Court's recent rulings have obliterated its earlier ruling in *Allard*. It is clear from the ruling of the Eighth Circuit in *Kornwolf*, that at least one circuit does not believe that *Andrus v. Allard* has been overruled, even implicitly. Therefore, this Court should grant *certiorari* to conclusively establish whether anything remains of *Andrus v. Allard*.

GOVERNMENT MAY NOT DESTROY AN "ESSENTIAL STICK" IN THE BUNDLE OF RIGHTS THAT MAKES UP PROPERTY WITHOUT PAYING JUST COMPENSATION

A. *Hodel v. Irving* And *Babbitt v. Youpee* Established That The *Andrus v. Allard* Analysis Used By The Eighth Circuit Has Been Abandoned By This Court To The Point That It No Longer Represents Controlling Precedent Regarding The Fifth Amendment.

In *Hodel v. Irving*, tribal members challenged the constitutionality of Section 207 of the Indian Land Consolidated Act, which provided that their property would escheat to the tribe upon their deaths, effectively allowing the government to abolish the traditional rights of descent and devise, that is, taking their property for

public use, without just compensation, in violation of the Fifth Amendment. *Hodel v. Irving*, 481 U.S. 703, 709 (1987). Justice O'Connor, writing for the Court, determined that Section 207 went too far and amounted to a taking without just compensation. *Id.* at 718.

Justice O'Connor, quoting the "essential stick" language of *Kaiser Aetna*,[2] determined that Section 207 amounted to the virtual abrogation of an essential stick in the bundle of property rights, that is, the right to pass property on to one's heirs: "In one form or another, the right to pass on property, in particular to one's family, has been part of the Anglo-American legal system since feudal times." *Id.* at 716. This Court held that because Section 207 took away the tribal members' ability to pass property by descent and devise, it destroyed one strand of the bundle of sticks that is property ownership. Even though Section 207 was limited to one strand, that strand was an "essential" one, constituting a taking. *Id.* at 710. Ten years later, this Court again held that Section 207 was an unconstitutional taking because it "severely restrict[ed] the right of an individual to direct the descent of his property," thereby diminishing the owner's right to use and enjoy his property. *Babbitt v. Youpee*, 519 U.S. 234, 244-245 (1997).

---

[2] *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

This Court's decisions in *Irving* and *Youpee* demonstrate that this Court has all but abandoned its 1979 holding in *Andrus v. Allard*, 444 U.S. 51 (1979).[3] In *Allard*, this Court viewed the bundle of property rights in their entirety and held that, in order for a federal law to violate the Takings Clause, the entire bundle of property rights must have been destroyed. "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Allard* at 65,

---

[3] Justice Scalia, joined by the Chief Justice and Justice Powell, in a concurring opinion in *Irving*, found that the Court's takings jurisprudence effectively limits *Allard* to its facts:

> I join the opinion of the Court. I write separately to note that in my view the present statute, insofar as concerns the balance between rights taken and rights left untouched, is indistinguishable from that statute that was at issue in *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979). Because that comparison is determinative of whether there has been a taking, *see Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 136, 98 S.Ct. 2646, 2665, 57 L.Ed.2d 631 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922), in finding a taking today our decision effectively limits *Allard* to its facts.

Irving at 719. In *Allard* there was no evidence that the defendants owned the feathers prior to the enactment of the Feather Acts. By contrast, in the instant case, there is uncontroverted evidence that Kornwolf owned the feathers before October 24, 1962, the effective date of the Bald and Golden Eagle Protection Act. *United States v. Kornwolf*, 276 F.3d 1014, 1015 (8th Cir. 2002). Under *Irving* and *Youpee*, Kornwolf has been denied an "essential stick" in the bundle of rights that is property ownership. Thus, his property has been "taken" without just compensation.

66. This Court in *Allard* reasoned that because Allard possessed other property rights, such as the right to possess, transport, and donate his property, the government regulation did not constitute a taking. *Id.* at 66-67. In other words, in *Allard* this Court focused on what rights the law allowed Allard to retain instead of what rights the law took from him. *Id.* Moreover, this Court held that Allard's loss of his right to sell and thus to benefit economically was a mere diminution of the value of his property. *Id.* at 66. "It is, to be sure, undeniable that the regulation here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking." *Id.* In *Irving* and *Youpee*, this Court no longer focused on what rights the tribal members were allowed to retain, but instead focused on whether the rights that had been taken were "essential sticks" in the bundle of rights that is property ownership. *Irving* at 716; *Youpee* at 245.

The Eighth Circuit failed to apply the analysis used by this Court in *Irving* and *Youpee*. Instead, it looked only at the right Kornwolf still possessed, the right to possess ancient Indian artifacts. Ignoring this Court's ruling in *Irving* and *Youpee*, the Eighth Circuit failed to analyze whether the Feather Acts that denied Kornwolf an "essential stick" in his bundle of property rights, that is, the right to sell his property, constituted a regulatory taking.[4]

---

[4] This Court has held that the right to use, possess, and dispose of property are all essential sticks in the bundle of property rights. *See Loretto v. Teleprompter Manhatten CATV*

In both *Irving* and *Youpee*, this Court concluded that it is irrelevant what other sticks the federal government allows people like Kornwolf to retain. What is relevant is whether people like Kornwolf are deprived by the government of an "essential stick," that is, the right to transfer or convey their property. Obviously, Kornwolf was denied an "essential stick" in the bundle of rights that is property ownership. As a result, the Eighth Circuit's decision is contrary to the controlling precedents set forth in *Irving* and *Youpee*. Therefore, this Court must grant *certiorari* to review the Eighth Circuit's holding and to ensure that it comports with the holdings of this Court in *Irving* and *Youpee*.

B. In *Lucas v. South Carolina Coastal Council*, This Court Implicitly Abandoned Its Decision In *Andrus v. Allard* When It Found That A Compensable Taking Of Property Had Occurred Despite The Presence Of Other "Strands" Or Essential Sticks In The Bundle Of Rights.

In 1986, Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes, one for personal use and one to sell to finance his children's education. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006 (1992). In 1988, South Carolina enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures

---

Corp., 485 U.S. 419, 435 (1982); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 n.6 (1982); *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945).

on his two parcels. Because Lucas' property was rendered worthless, he sued for "just compensation" under the Fifth Amendment of the U.S. Constitution. *Id.* at 1006.

This Court held that a taking had occurred because the Beachfront Management Act denied Lucas "all economically beneficial or productive use" of his property. *Id.* at 1015. *See also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-296 (1981). In reaching its decision, this Court recognized that other significant strands in Lucas' bundle of property rights remained unaffected by the state law. For instance, Lucas still possessed the right to exclude others, the right to make passive and recreational uses of the parcels, and the right to alienate the property. *Id.* at 1017. However, despite the sticks that still remained, an "essential stick" had been destroyed. Therefore, this Court held that because Lucas was denied an essential stick in his bundle of property rights resulting in the loss of "all economically beneficial use" of his property, he had suffered a taking. *Id.* at 1019. It is evident that this Court's decision in *Lucas* all but destroys its 1979 holding in *Allard* because the Court's analysis in *Lucas* determining whether a taking had occurred is completely different from that undertaken in *Allard*.

In *Lucas*, this Court did not view Lucas' bundle of property rights in its entirety as it had previously in *Allard*, but rather split the bundle into separate identifiable property interests. In so doing, this Court recognized that, although Lucas possessed other property rights, that is, other "sticks" in the bundle of sticks, the right to

economic beneficial use of his property had been destroyed. The *Lucas* Court implicitly but clearly abandoned *Allard* when it analyzed the "sticks" of the bundle separately and determined that a regulation that denied one "stick," one essential stick, constituted a taking. *Id.* at 1015.

Under the Feather Acts, even though Kornwolf still has the right to possess the artifacts, he is prohibited from selling those artifacts, rendering them economically worthless. If the Eighth Circuit had applied *Lucas*, and not *Allard*, the Eighth Circuit would have determined that because the Feather Acts deny Kornwolf all economical beneficial use of his property, the Acts constitute a taking in violation of the Fifth Amendment.

Therefore, this Court must grant *certiorari* to review the Eighth Circuit's holding and to ensure that it comports with the holding of this Court in *Lucas*.

CONCLUSION

In deciding whether the Feather Acts violate the Taking Clause of the Fifth Amendment, the Eighth Circuit applied *Allard*, instead of this Court's most recent decisions in *Irving*, *Youpee*, and *Lucas*. Because the Eighth Circuit erred in applying *Allard*, this Court should grant *certiorari* to resolve whether the ruling in *Allard* that purportedly allows government to destroy an "essential stick" in the bundle of rights that makes up property without paying just compensation is still controlling

precedent in light of this Court's rulings in *Irving*, *Youpee*, and *Lucas*.

Respectfully submitted,

WILLIAM PERRY PENDLEY*
*Counsel of Record
TARA BURTON RISMANI
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

Dated: April 26, 2002